No. 2674

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY (a corporation),
Plaintiff in Error,

vs.

SAMSON IRON WORKS (a corporation),
Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

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Filed this.....day of May, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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1. Introductory.

Defendant's criticism of the statement of the case contained in our opening brief is not susceptible of reply for the reason that defendant makes no specific statement whatever but is content to say that our analysis of the facts is faulty. Defendant asserts that there was a conflict of evidence upon the issues in the case, but fails to show wherein the conflict exists. It is true that the important factor in controversy was whether plaintiff's generator or defendant's gas engine was responsible for the failure. But the mere assertion of defendant that its gas engine was not at fault did not create a conflict

of evidence upon that issue. The record must be examined to determine what evidence was adduced. This was fairly done in the opening brief. The statement of facts therein contained is complete and stands uncontradicted.

But the purpose of the consideration of the evidence in the opening brief has been misconstrued by the defendant. The specific errors upon which we rely for reversal were committed in the instructions to the jury. For the sake of the discussion of these errors, it may readily be conceded that the issue of responsibility was an open one. For the purpose of the argument in this behalf it must be assumed, not that the jury had no alternative but to find for the plaintiff on the merits but merely that under the evidence they might have so found. The propriety of the instructions is thus to be considered from the standpoint that the jury may have decided in favor of the plaintiff.

Having argued these questions, the opening brief proceeds to analyze the record and to present the view that upon unconflicting evidence the defendant was at fault. The primary purpose of this discussion was to show how manifestly prejudicial the erroneous instructions were. If a verdict for the plaintiff was the only legal conclusion, it was entitled to substantial damages and any error in the instructions must have been prejudicial. It is true the lower court submitted the issue of responsibility to the jury. But the opinion of the trial judge in

this regard is not conclusive upon this Court. We are content, however, to employ this subject as the means of emphasizing the gravity to the plaintiff of the errors in the charge to the jury upon the question of damages. Accordingly, a few words will be devoted later in this reply to the argument of the defendant upon the merits of this issue.

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2. It Can Not be Said that the Errors in the Instructions Concerning Damages Were Not Prejudicial to the Plaintiff.

Defendant's contention that the errors in the charge to the jury upon which we rely were harmless rests in part upon the fact that the trial judge called upon the jury to determine which party was responsible for the defective installation. Defendant argues that the verdict in its favor was a decision for it upon the merits and that the jury never considered the question of damages. This would be correct if there had been but one issue to be decided by the jury. But defendant loses sight of the fact that the question of culpability was only one of the issues in the case. Surely no one will say that the decision on that issue concluded the jury's functions. When they found that the defendant was at fault they were then called upon to determine what damage plaintiff had suffered from the breach. That was essential to a verdict. So if the only element of

damage upon which the jury were disposed to give plaintiff relief had been removed from their consideration by the express injunction of the trial judge, they must give the defendant a verdict for its costs. Thus it is futile to argue that because the jury must first pass upon the issue of responsibility, it was impossible for them to deny plaintiff relief upon the ground that in their opinion and under the law as stated by the court they found no damage proved. In baldly asserting that the verdict means that the jury found the plaintiff at fault the defendant professes a clairvoyance to which no court has ever pretended.

It is plain from defendant's brief that it misconceives the true rule of prejudicial error. Defendant assumes that the burden is upon us to point out specifically wherein the error committed must necessarily have affected the decision against us. In this defendant is mistaken. The burden rests upon it. From error prejudice is presumed unless it can be conclusively shown on every possible hypothesis that the error played no part in the jury's mind. For example, in *Vicksburg etc. R. R. v. O'Brien,* 119 U. S. 99, it was held:

> We are unable to say that the defendant was not injuriously affected by the reading of the physician's certificate in evidence. * * * It is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of *did not and could not* have prejudiced the rights of the party. (p. 103)

In *Chicago Ry. Co. v. Sutton,* 63 Fed. 394, the Circuit Court of Appeals for the Eighth Circuit held:

> The jury may have thought that the engineer had no right to proceed with his engine; no matter how slowly, after discovering the boy in proximity to the tract, until he had left that neighborhood and was entirely out of danger; or it may have been that the jury believed the engineer to have been guilty of some other slight error of judgment, which rendered him culpable within the stringent rule of liability announced by the trial court. *But it is unnecessary to indulge in speculations of this nature.* It is sufficient to warrant a reversal of the case that the charge was erroneous; that it may have misled the jury; and *that it does not affirmatively appear that the misdirection was harmless error.* (p. 399)

In *Durant Mining Co. v. Percy Co.,* 93 Fed. 166 (C. C. A.), it was held: "The presumption from error is prejudice." (p. 169).

The case of *Green v. White,* 37 N. Y. 405, is almost directly in point and goes much further than is necessary in the case at bar. That was an action for breach of contract in which the defendant had agreed, for the sum of $3,000, to sell and deliver a ship to the plaintiffs, and to pay to the plaintiffs the profits earned upon a certain voyage. The jury were instructed that the measure of damages for defendant's refusal to perform was the difference between the contract price, to-wit, $3,000, and the actual value of the ship; that if that value were

equal to or less than the contract price no damages could be given on account of the breach, but that the plaintiffs would nevertheless be entitled to a verdict for such net freight as had been made on the trip. An instruction offered by the defendant that if the value of the vessel plus the net freight did not exceed $3,000 the plaintiffs could not recover, was refused. A verdict was rendered in favor of plaintiffs for $700. Upon appeal it was held that the court's instructions and refusal to give that requested by the defendant were erroneous "in that the contract for the purchase of the vessel and her freight was entire; the two subjects together were purchased and sold, at the price of $3,000, and as one purchase and sale; there is no power or right of separation into parts."

No witness put the value of the freight at more than $200, and so plaintiffs argued that this was an absolute indication that the jury had found the vessel to be worth more than $3,000, and therefore the objectionable part of the instruction given did not become applicable. In rejecting this contention the court held:

> If it is possible that the defendant was injured by this error, the verdict must be set aside. It is not for the defendant to show how or to what extent he was prejudiced; the existence of the error establishes his claim to relief. If the plaintiffs wish to sustain the verdict, it is for them to show that the error did not and could not have affected it.

> The plaintiffs insist that this is established. They insist, that if the jury did not find the vessel to be worth less than $3000, then the latter portion of the objectionable charge, that the plaintiff would still be entitled to the value of the net freight, was not applicable; the contingency therein stated did not occur. The verdict of $700 is claimed to be conclusive evidence that the vessel alone was worth more than $3000, as no witness put the value of the freight at more than about $200. This may be true, and I think it quite probable that it is. It would, however, be unsafe to disregard an admitted error on this theory. No one can certainly say how the minds of individual jurors are affected, or how a united result was reached. (pp. 406-07)

See also *St. Louis etc. Ry. Co. v. Needham et al.*, 63 Fed. 107. (C. C. A.)

Instead of undertaking its burden in this respect and showing affirmatively that the errors complained of were harmless, defendant merely comments upon the argument in the opening brief, which disclosed wherein the errors must materially have affected the decision. In doing so we went further than was necessary to entitle us to have the errors reviewed in this Court. Defendant's misconception of the rule of appellate procedure is clearly disclosed at page 6 of its brief. Reference is made there to plaintiff's endeavor "to establish that the alleged error in the instruction regarding the damages would not be harmless error." Under the authorities cited above we are under no such duty. The burden is on the defendant, and in not

undertaking it, defendant has failed to make any showing to prevent the consideration by this Court of the propriety of the instructions.

Let us, however, consider defendant's argument as far as it goes.

We suggested in the opening brief that the jury were enjoined from awarding any damages on account of the first generator. Defendant questions the accuracy of this statement.

The measure of damages was the contract price less the value of the parts not delivered and certain other deductions. The jury were told that since title to the first generator had not passed they must subtract its value as well as that of the other two from the total price. It follows that in so far as the first generator played any part in the contract price the jury were foreclosed from allowing the plaintiff any recovery.

In response to this defendant points to the charge that plaintiff was entitled to recover the expense of installation and removal of the generator and the profit lost (brief, page 5). This contention was anticipated in the opening brief; it was there explained that inasmuch as we did not contemplate erroneous instructions, we offered no evidence to meet the view ultimately expressed by the trial court. Defendant contradicts this, asserting:

> "It (plaintiff) certainly offered evidence of the expense of putting the cables and bed-plate in. It also offered evidence of the reasonable

cost of the installation of the second and third generators and permanent switchboard." (brief, p. 5).

The statement that we offered evidence of the expense of laying the cables and bed-plate is absolutely without authority in the record. Defendant cites page 160 of the transcript. There appears at that page a *letter* written by plaintiff to defendant. Statements in this letter are, of course, evidence of nothing. But there is no word there *about cables.* The letter recites that Wernicke had ordered three bed-plates at the factory at the price of $35 each. *But none of these was ever delivered or used.* The castiron sole-plate placed under the first generator had been made to order at Portland (Testimony of Wilson, p. 129).

The evidence relating to the other generators and the switchboard was that to install all of them would cost $400. Surely this did not prove anything concerning the cost of the installation of the first generator. It did not appear that the method or expense of erecting any two generators was the same. The lump figure for the switchboard and remaining generators afforded no basis for calculation as to the first. Reverse the situation and suppose that the plaintiff were contending that the testimony in question was a sufficient showing of the cost of the installation of the first generator. Such an argument would be absurd.

But even if there had been some evidence of the cost of installing the first generator no one can say that the jury did not choose to ignore it and were disposed to allow the plaintiff something only on account of the generator itself. This the trial judge forbade.

This is merely one application of the rule above stated that every possibility that the error affected the decision must be eliminated before the reviewing court can say that the error was not prejudicial.

By way of further example, we suggested in the opening brief that even assuming that the jury were permitted under the instructions to award damages to the plaintiff, they might have found the parties both at fault and set off the defendant's damages under its counter-claim. To this defendant replies that if plaintiff were found to have been at fault, no recovery could be had by it. Thus defendant ignores the very gist of this idea—that both parties may have been guilty of a breach of contract and therefore each liable to respond to the other in damages. The jury could have found that the plaintiff had performed the contract as to the first generator and was entitled to recover on that account. Assuming, then, that the jury decided further that the plaintiff was late in the delivery of the remaining apparatus, defendant would have its remedy for that. The breach on each side would entitle the other to damages but might not be of sufficient gravity to deprive the parties of their respective

claims upon the contract. Just such a situation was presented in *Ames Iron Works v. Rea,* 19 S. W. 1063 (Ark.), which will be fully stated in a later section of this brief.

Defendant's argument proceeds on the assumption that it is legally impossible for both contracting parties to have an action for damages upon the same contract. Defendant thus fails utterly to realize the meaning and effect of independent covenants. One party's performance may be such that while he is entitled to recover, he must at the same time pay the other on account of the features in which the performance is defective. This is the underlying substance of the remedy of counter-claim which the defendant has invoked. The subject is so fundamental in the law of contracts that a general citation will suffice.

> *9 Cyc.,* 642;
> *Philips Construction Co. v. Seymour,* 91 U. S. 646, 650-1.

The opening brief offered still another suggestion of the likelihood of prejudice flowing from the errors in the charge. This concerned the second and third generators. The jury were told that if these were sold for as much as they would have brought plaintiff under the contract, "the plaintiff can be allowed nothing for the failure of defendant to accept them." (*186) This was a distinct prohibition against giving plaintiff any damages on this account.

Defendant's breach contains no mention of this feature of the case.

Furthermore, if the evidence permitted no other conclusion that the defendant was at fault, the verdict in its favor must necessarily have been produced by the instructions depriving the plaintiff of its principal items of damage.

We conclude, therefore, not only that defendant has failed to show that the errors complained of were harmless but that many features in which prejudice may have resulted have been affirmatively established. It follows that the accuracy of the instructions is a vital factor upon which the integrity of the judgment depends.

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3. Error Was Committed in Giving and Refusing Instructions Concerning the Title to the Delivered Generator.

Defendant does not question the statement in the opening brief of the rule that in a contract of conditional sale the vendor may waive his title. Defendant's sole objection to the application of that rule to the case at bar is that the plaintiff elected not to waive its title but to insist upon it. This election is said to have been made both in the form of the complaint filed and in the conduct of the plaintiff after defendant's repudiation.

It is at once notable that the position of the defendant here is not the same as that presented in

the instructions of the trial judge. The defendant does not say that the lower court was correct in its view that the contract required the plaintiff to resume possession of the first generator. The jury were not instructed at all upon the proposition for which defendant now contends, to-wit, that the plaintiff elected to assert its title to the first generator. If the defendant's position is sound, it should have obtained such an instruction, and a verdict based thereon would be safe from attack. But no such instruction was asked and defendant is now put to the necessity of advancing an argument upon an immaterial matter in an endeavor to avoid the natural result of the error in the charge, which there is no attempt to defend.

However, we will assume that the defendant's contention is available here and answer it on the merits.

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4. The Complaint Is an Election to Waive the Title Clause. The Count on the Special Contract Examined.

Let us first consider the count in the complaint based upon the special contract. It must be borne in mind that the breach of this contract occurred after the first generator had been delivered and installed and before the other apparatus had been started on its way to the point of delivery. The method most conducive to clear analysis is to put oneself in the place of the plaintiff at this moment.

The defendant has repudiated the contract and the plaintiff desires to avail itself of its legal remedy. The contract preserves title to all the apparatus described even though delivered and installed, but the plaintiff is advised of its right to waive the title clause and prefers to do so. What is the form of a complaint suitable to present its case?

If the title clause is waived (and defendant does not say that it can not be waived), the case stands as if that clause were not in the agreement. The plaintiff then may invoke the remedy which the law provides in a case of a contract of sale where delivery accomplishes the passing of title. The vendor's remedy on the contract after partial delivery is well settled. The measure of recovery is the contract price less what the vendor has been saved in the particulars in which he has not yet performed. These deductions include the value of the apparatus undelivered since that value may be realized at once from other sources. But the law does not deduct the value of the article which has been delivered and installed. This rule is applied by the Circuit Court of Appeals of the Third Circuit in *Fisher v. Newark,* 62 Fed. 569, where there had been a partial delivery under a contract of sale followed by a breach by the vendee. After a judgment for the vendee it was held on writ of error prosecuted by the vendor:

> The plaintiff is not entitled to the balance of the purchase money; but only to such sum as will cover his loss—in other words, the profit

> he would have made if the ice had been taken and paid for according to the contract. This may be ascertained by deducting from the unpaid purchase money the value of *the undelivered ice* in the market (in Canada) at the time it should have been taken, and the expenses of loading, etc., saved to the plaintiff by the failure to take it. (p. 573.)

See also *Yellow Jacket Co. v. Chapman,* 74 Fed. 444, 56, (C. C. A., 4th Cir.)

It is noteworthy that the same measure of damages is prescribed by the California Civil Code (Secs. 3310 and 3311). The undelivered apparatus not having been sold as in the case of a pledge, subdivision 2 of section 3311 would be controlling in the case at bar.

As the opening brief states (pp. 27-8), the trial judge recognized this to be the correct rule of damages. But he refused to instruct that the plaintiff could waive the title clause, and he required that the value of the first generator be deducted from the contract price as well as that of the undelivered apparatus.

The plaintiff's complaint is based precisely upon the theory above discussed. It alleges first, the delivery and erection of the first generator; second, readiness to perform the remaining features of the contract and finally, defendant's repudiation from which flowed the legal conclusion that the plaintiff must desist and mitigate the damages by holding the apparatus undelivered at its value.

The bill of items served by plaintiff in response to defendant's demand confirms this idea in detail. Under the rule of the California Supreme Court, which is binding here since it concerns a matter of pleading, the bill of items became a part of the complaint. (*Chapman v. Bent*, 133 Cal. XIX; 65 Pac. 959, 61). It specifies:

Contract price		$7,850.00
Less total of following:		
2d and 3d generators not delivered	$2,477.67	
Freight on same not incurred	305.60	
Switchboard not delivered	1,267.83	
Freight on same not incurred	100.80	4,151.90
		$3,698.10 (*95)

Thus plaintiff's statement of the cause of action shows with the utmost clearness that the title clause was waived and that plaintiff was proceeding as in the case of an ordinary sale. The bill of items pursues the measure of recovery prescribed in *Fisher v. Newark Ice Co.*, (*supra.*) It deducts the value of the features in which the contract was unperformed. It does not deduct the value of the first generator, thus showing distinctly that the plaintiff considered that the title to the installed generator had passed—as to that apparatus the title clause had been waived.

The situation respecting the other apparatus is, of course, different. Regardless of the reservation of title these articles belonged to the plaintiff be-

cause they had not been delivered. The title clause is material and controlling only in relation to the apparatus delivered which would otherwise in the ordinary contract of sale become the property of the purchaser. Thus it is solely as to the delivered article that the reservation of title is susceptible of waiver.

Let us examine now the argument which defendant advances in support of the assertion that the complaint was an election to assert title to the first generator. It is said:

> Having alleged that he had partly performed, and was able, ready and willing to complete performance, he should have tendered the property to us and claimed the full purchase price. (p. 10)

Under settled principles settled by the great weight of authority and exemplified in the cases above cited, the plaintiff could not proceed as the defendant suggests. Such a remedy in all cases of contract of sale is allowed only in New York (*Ideal Cash Register Co. v. Zunino,* 79 N. Y. S. 504). But in practically every other jurisdiction the seller can force title on the buyer only where the articles undelivered have been manufactured for a particular purpose and have no independent market value (*Kinkead v. Lynch*, 132 Fed. 692). But even in such a case the vendor has the option to pursue either remedy; that is, he may hold the article as the property of the buyer or recover the difference between the contract price and its value (Id.). And

contrary to the suggestion made by defendant, it is not necessary for the seller to make a tender after the buyer's repudiation *(Habeler v. Rogers,* 131 Fed. 43). In the face of a repudiation a tender would be a vain act, which the law does not require.

Defendant offers but one other reason why this action did not constitute an election to waive the title clause. It is said that the plaintiff does not ask for the purchase price but for damages computed by deducting certain items from the purchase price. It is noteworthy that defendant cites no case to support the distinction thus asserted. In fact, defendant's entire brief is conspicuous for the lack of authority upon which to rest the legal propositions for which it contends.

As we have already shown, the repudiation by the defendant while the contract was in the course of performance prevented the plaintiff from completing its obligations so as to demand the full contract price. Accordingly, the amount of plaintiff's recovery was to be reduced. Thus it was not by plaintiff's choice that the action was not for the entire purchase price; therefore it cannot be said that the nature of the suit constitutes an election. Surely, there is no basis in reason nor on principle why a vendor should be deprived of his right to waive his title to those articles which have been delivered, particularly when the vendee's repudiation has prevented the delivery of the remainder and a consequent obligation to pay in full.

There is no difference in legal theory between an action upon a contract of sale after full performance in which the entire contract price is sought to be recovered and an action after partial performance in which the contract price with certain deductions is the measure of recovery. Both are actions for breach of contract and ask damages for the breach. In one case the breach is the failure to pay the full price stipulated and the measure of damages is the contract price, hence the colloquial expression that the action is for that price. In the other case the breach is dual—failure to pay and prevention of performance—and the damages are computed by subtracting from the contract price what is saved the vendor because he has not been required to complete performance. Thus in Sedgwick on Damages (9th ed., vol. 2, p. 1564), it is said:

> Where a vendee is sued for non-performance of the contract on his part, in not paying the contract price, if the goods have been delivered, the measure of damages is of course the price named in the agreement.

In *Kinkead v. Lynch*, 132 Fed. 692, Judge Sawyer held in this Circuit:

> Does not the testimony in the present case put plaintiff in the position of having fully performed his contract or agreement with the defendants, and establish the fact that he made a proper tender of the delivery of the property;

> and, if this be so, would not the rule applicable to the case be that he is entitled to recover the contract price, if there was any, and, if not, the value of the machinery as manufactured, *as his measure of damages.* (p. 696)

In *Lincoln etc. Mfg. Co. v. Sheldon,* 62 N. W. 480 (Neb.) after citing numerous cases to this effect, the court states the following rule concerning the remedies appropriate to the case before it:

> He (the vendor) may keep the property made the subject of the contract, and sue the vendee for his failure to perform, and in such a case his *measure of damages* will be the difference between the contract price of the property and its actual value at the date of the breach of the contract; or the vendor may tender the property made the subject of the contract to the vendee, and then, in a suit upon the contract, the vendor's *measure of damage* will be the contract price of the property. (p. 483)

The law of damages is codified upon the same theory in the California Civil Code. Under the chapter headed "Measure of Damages" and the sub-title "Damages for Breach of Contract," it is provided generally:

> For the breach of an obligation arising from contract, the *measure of damages,* except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for *all the detriment* proximately caused thereby, or which, in the ordinary course of things, will be likely to result therefrom. (Sec. 3300)

The special cases under consideration here are then provided for in analogous terms. It is declared in the one instance:

> The *detriment* caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is vested in him, is deemed to be the contract price. (Sec. 3310)

And where the title is not vested the *detriment* is determined by the rule which has been fully discussed above (Civil Code, sec. 3311).

There is still another answer to defendant's contention that the complaint is an election by plaintiff to assert title to the first generator. Under the law such election is manifested by an action *to recover possession of the property delivered.* (See cases cited in opening brief). Plainly, there is nothing in the complaint which can be construed into an attempt to replevy the first generator. Therefore, plaintiff's right to pursue the remedy which it would have in the case of unconditional sale was never foregone.

And as a final reply to the defendant's argument: The complaint seeks to recover compensation which is due only upon the theory that the obligations imposed upon the defendant by the contract were still in force and that the defendant must pay damages for breaching them. This demand is a positive declaration that the plaintiff did not assert its title to the delivered generator but elected to waive it. If a vendor asserts his privilege under

the title clause and elects to enforce his right to possession, the contract is thereby rescinded. It was so held in *Manson v. Dayton,* 153 Fed. 258 (C. C. A. 8th Circ.), where the following extracts were quoted from other opinions:

> Although called a lease, the transaction was intended to be, and in effect was, a conditional sale; the vendor reserving the title until the final payment should be made, and the right of rescission, in case the purchaser should fail in the payment of any installments of the so-called rent, or an additional amount to make the total sum $1,700. (p. 265)
>
> * * * * * * *
>
> But they rescinded the contract by retaking into possession the subject of it, which they had a right to do. (p. 266)

In *Dunlop v. Mercer,* 156 Fed. 545, the same court held concerning the exercise of the right of the vendor under conditional sale to resume possession:

> The legal effect of that taking, under the established rule of property in Minnesota, would be to annul the obligation to pay the agreed price of the property taken. (p. 549)

In *Sugar Beets Co. v. Lyons Co.,* 161 Fed. 215, the court, speaking of the remedies of the vendor, held:

> Concededly an action at law may be brought to recover possession of the drier, or for breach of contract, or for the balance of the purchase price unpaid. That a rescission of the contract would be necessary before instituting the first-mentioned remedy, or that the amount paid to apply on the purchase price would have to be

> refunded, or that the right to future deliveries of dried pulp may be deemed uncertain, are not sufficient reasons, in the circumstances narrated in the bill, for invoking the power of a court of equity. (pp. 217-18)

Again, in *Bray v. Lowery,* 163 Cal. 256, it was held:

> By this seizure of the cars upon the claim that respondent was in default and by his refusal to return the property, appellant treated the contract as abandoned and annulled by respondent. Formal rescission on the part of the latter was, therefore, not necessary. (p. 261)

Upon the same subject it was held in *Kelley Springfield Co. v. Schlimme,* 69 Atl. 867 (Penna.):

> It could "enter upon the premises where said rollers may be located, and take possession of, and remove same without trespass," thereby rescinding the contract. (pp. 868-69)

It is axiomatic that a rescission puts an end to the contract for all purposes and precludes an action upon the contract for damages. In *Mundt v. Simpkins,* 115 N. W. 325 (Neb.), it was held:

> The law is too well settled to need discussion that if a party elects to rescind a contract he can not sue thereon to recover damages for its breach, and if he affirms the contract by suing for a breach he cannot thereafter rescind.

The same distinction is pointed out by Justice Brewer in *Anvil Mining Co. v. Humble,* 153 U. S. 540, at page 552:

In *Smeesters v. Schroeders,* 101 N. W. 363 (Wis.), upon the same subject it was said

> It is, of course, apparent, as stated in the cases above cited, that the remedies above described are wholly inconsistent. Either there is a contract, for breach of which plaintiff is entitled to recover damages, or the contract is set aside and goes out of existence. (p. 364)

In *Abraham v. Browder,* 21 So. 818 (Ala.), it was held:

> He cannot insist that a contract has been rescinded, and yet recover on the contract. (p. 818)

See also *Houser Co. v. McKay,* 101 Pac. 894 (Wash.).

The action here is obviously based upon the contract and upon its continued existence as the basis of relief. The complaint is therefore utterly inconsistent with the idea of the assertion of title to the delivered generator and the rescission which that attitude on plaintiff's part would necessarily accomplish.

We conclude therefore that the count in the complaint based upon the special contract clearly discloses the plaintiff's election to pursue its remedy independent of the title clause and to waive its title to the delivered generator. This election is, moreover, established beyond question by the specific terms of the bill of items.

5. The Count for the Value of Materials Delivered Is an Election to Waive the Title Clause.

Defendant does not contend that this count is not based upon a waiver of the title clause. Plainly, it could rest upon no other theory. Defendant argues that a suit for the reasonable value of the first generator is not "an action on the contract for the purchase price." (Brief, p. 11). By this the defendant apparently means to say that a vendor under conditional sale who waives his title may recover the price of the article delivered but not its value. There is no possible basis for this contention. The waiver of title leaves the vendor with his usual remedies upon a sale of property. Suppose no price is specified in the contract. In that case the recovery can only be determined by the reasonable value of the article. The defendant cites no case deciding that a vendor under conditional sale may not recover the value of the article delivered. The authorities are clear that he may. For example, in *Thienes v. Francis,* 138 Pac. 845 (Ore.), it was held:

> Where a contract for the conditional sale of personal property has been broken by the vendee, the vendor may waive his rights to recover possession of the property and sue for the value thereof, treating the contract as executed. By the sale of the property before title passed, Thienes broke the contract of conditional sale; therefore Francis had the right *to sue for the value of the same,* and the decree in regard thereto is affirmed. (p. 846)

And in *Poirier Mfg. Co. v. Kitts,* 120 N. W. 558 (N. Dak.), the court held:

> The vendor under a contract of conditional sale may elect whether he will recover possession of the property sold in which he still retains title, or waive his title and *sue for the value* or selling price, but he cannot do both. (p. 560)

Defendant also asserts that under the facts here the count for the value of the article delivered will not lie (citing *Barrere v. Somps,* 113 Cal. 97). That was a suit for money had and received. A deposit had been made with the defendant as security under an agreement which required the performance of certain acts by the plaintiff. These matters were still undetermined and it was accordingly held that the case proved did not come within the scope of the complaint.

On the other hand, the authorities hold without dissent that where partial performance has been given by one party to a contract and the other is guilty of a breach, the former may either bring action for damages upon the contract or sue for the value of what he has rendered. Thus Professor Lawson, in his article upon "Contracts", after discussing the subject of repudiation, says:

> The rules stated in the above sections apply also when the renunciation is made in the course of performance, for renunciation of a contract by one of the parties in the course of performance discharges the other party from a

> continued performance of his promise, and entitles him to sue at once for the breach, or on a *quantum meruit*.
>
> (*9 Cyc.* 639.)

In *Upstone v. Weir*, 54 Cal. 124, it was held concerning the remedies of the seller upon breach by the buyer:

> If the plaintiff had chosen to waive his contract and sue in general assumpsit for materials furnished, then his measure of damages would be the value of the ironwork actually furnished. (p. 126)

And in *United States v. Molloy*, 127 Fed. 953 (C. C. A. 2d Circ.), it was held:

> Where a purchaser of goods wrongfully breaks the contract of sale, the seller is entitled to sue on a quantum valebat for compensation for his partial performance. (Syl. 2).

It follows that the plaintiff could waive its title to the first generator and sue for its reasonable value. The complaint contains appropriate pleading for this purpose.

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6. The Sale and Other Disposition of the Apparatus Undelivered Was Not an Election to Assert Title to the Delivered Generator.

The discussion pertinent under this title is substantially presented in the foregoing section. Since upon the theory of a waiver of the reservation of title the plaintiff had no alternative but to dispose

of the undelivered property—as it did—it is idle for the defendant to argue that its action was an assertion of its rights under the title clause. Defendant's contention is that since the plaintiff asserted title to that which was still in its possession, its conduct must necessarily have had the same effect as to the first generator which had been installed. Again, no authority is cited. None exists. The waiver by plaintiff of the right to resume possession of the delivered apparatus placed the parties in the same position as if the contract were one of unconditional sale. The plaintiff then acted in accordance with the dictates of the law. Upon the defendant's breach the second and third generators were freed of the obligations of the contract and their value became a factor in mitigation of the plaintiff's damages. For the same purpose—to minimize the damages—the plaintiff dismantled the switchboard, which had no selling possibility and would otherwise have been a total loss for which the defendant would have been compelled to pay (*146). Even in a jurisdiction which confers upon the vendor the right to hold the undelivered property as that of the vendee and fixes the damages at the full contract price, there would be no sound reason in depriving him of his right to waive title as to the delivered property as a penalty for his desire to aid the vendee by retaining the balance in reduction of the latter's loss.

What the defendant's contention really means—although defendant avoids saying it—is that where under an entire contract of conditional sale the

vendee repudiates after partial performance, the vendor has no choice but must resume possession of the delivered property. Since under the law of nearly every jurisdiction he cannot force title to the undelivered articles upon the vendee and is required to treat them as his own, it would follow from defendant's argument that the vendor is compelled to assert his title to that which has been delivered. Surely, there is nothing in reason nor in authority to support this idea.

The issue should not be confused by any consideration concerning the delivery of the first generator. There was ample evidence that it had been incorporated into the defendant's installation in the Spalding building. However, the instructions which are in controversy are framed upon the theory that the generator had been installed (*185), and they expressly concede that there had been a "delivery and installation" (*185-6). And it is fundamental that acceptance is unnecessary where there is a proper delivery (35 Cyc. 257).

If all the apparatus contracted for had been delivered, and defendant had refused to pay, the plaintiff could have waived title and brought an action on the contract, alleging damages in the amount of the agreed price. Why, then, should the privilege to waive title be withheld from the vendor because the vendee has abandoned the contract after partial delivery? There is really no assertion to title to the property remaining in the vendor's hands. He acts merely in mitigation of damages.

Moreover, the stipulation reserving title does not become operative upon any property until it has been delivered. Prior to delivery title ordinarily inheres in the vendor regardless of any such clause in the contract. It is self-evident that a provision reserving title is an unnecessary statement of a legal conclusion until the property is delivered. Then for the first time it comes into force and alters the legal status. Therefore, as to any property which has not been delivered the right or duty to elect under the title clause does not accrue. Thus, it is plain that neither the fact that two generators and the switchboard had not been delivered nor the action of the plaintiff concerning these articles had the slightest bearing upon its privilege to waive its title as to the delivered generator and proceed as in case of an unconditional sale.

Moreover, to hold otherwise would confer upon the guilty vendee the power to prejudice the right of election which the agreement reserved to the vendor. By repudiating the contract before complete delivery, the vendee could destroy the vendor's option and force him to take back what had been delivered. That this is opposed to the underlying theory of conditional sales is clearly decided. In *Detroit Heating Co. v. Stevens*, 52 Pac. 379 (Utah), the contract was similar to that at bar. The plaintiff had

> agreed to furnish and erect for defendant in his carriage and implement building at Ogden,

> Utah, a hot-water heater, with all the usual and necessary attachments and connections. (p. 379)

The agreement contained the usual clause reserving title. Concerning it the court held:

> It was not in the power of the defendant to take advantage of the condition, and regard the title as in the plaintiff, and rescind the contract, or maintain he had not accepted the heater, and refuse to pay for it, for the same reason. * * * But upon the conceded facts, and upon those as to which there is no room for a difference of opinion as to their existence, from the evidence, we must hold as a matter of law, that the defendant accepted the heater, and had no right to elect to rescind the contract as he did; and that plaintiff must recover, if at all, *damages for a breach of the contract.* (p. 382)

In *Appleton v. Norwalk*, 22 Atl. 681, it was held:

> It is said that the plaintiffs had the right, at their option, to retake the property at any time if the defendant fail to pay any installment for a period of 30 days after it became due. But this is a right which the plaintiffs had in case the defendant should break the contract by non-payment. It gives the defendant no right to return the books. (p. 681)

And in *Ainsworth v. Rhines,* 69 N. Y. S. 876, the court, discussing the position of the vendee under a conditional sale, held:

> Neither the contract nor the principles of law gave defendant the right, if he became sick of his contract, to terminate it, and return the

> piano and escape further liability. As to him, the contract fixed his liability, and did not give him the right to terminate it. (p. 877)

A case of partial delivery under a conditional sale was presented in *Ames Iron Works v. Rea,* 19 S. W. 1063 (Ark.). As in the case at bar, the contract was entire. Upon the ground that the vendee was in default in payment, the vendor sought to exercise his election to retake the property. The vendee claimed damages resulting from the vendor's failure to deliver the remainder of the apparatus and had tendered a sum greater than was necessary to cover the excess of the amount due the vendor over the damages suffered by the vendee from the incomplete delivery. The court held that the rights of the parties should be adjusted on that basis, and that the title to the apparatus delivered should pass to the vendee upon condition that the tender was made good. The syllabus reads:

> In replevin for machinery by the seller thereof on a contract providing for title remaining in him until full payment of purchase money, defendant may, by way of defense, plead damages for nondelivery of part of the machinery sold, and an offer to pay the balance of the purchase money in excess of the damages which may be ascertained. (Syl. 1)

The title to part of the property contracted for under conditional sale was thus conferred upon the vendee. Since the latter had not been guilty of a breach, the vendor's right of election did not accrue. If, as in the case at bar, the vendee had broken the

contract, the vendor would, of course, have had his election. The decision is thus direct authority in the case at bar.

Among the decisions where the courts have applied the same idea of the severability of the subject matter of a conditional sale, although the contract is entire, is *Richardson v. Teasdall,* 72 N. W. 1028 (Neb.). There a stock of drugs had been sold, subject to reservation of title, for the sum of $2,000. On the vendee's breach after part payment the vendor was permitted to recover that part of the stock which still remained in the possession of the vendee.

Again in *O'Rourke v. Hadcock,* 22 N. E. 33 (N. Y.), several chattels had been sold under conditional sale. Upon the vendee's failure to pay the vendor seized the property for the purpose of selling it and collecting the amount due. But it was held that he had no right to seize and sell more than was sufficient to satisfy his demand.

Lest any question arise because of the language of Section 3311 of the Civil Code prescribing the measure of damages where the buyer refuses to pay for personal property to which title has not passed, it is well to point out that this rule does not apply where the property has been delivered under a conditional sale. The decisions of the California Supreme Court cited in the opening brief are conclusive upon this question. It is also noteworthy that this view has been specifically applied to Sec-

tion 1899 of the Revised Codes of North Dakota, which is precisely the same as the California codification (See *Dowagiac Mfg. Co. v. Mahon,* 101 N W. 903).

However, to return to the defendant's contention that plaintiff's action concerning the second and third generators constituted an election, it is noteworthy that defendant's argument is opposed to a fundamental rule concerning election of remedies. There is no suggestion that plaintiff's conduct created an estoppel. Therefore its acts did not constitute an election. The principle is clearly stated at 15 *Cyc.* 260-261, as follows:

> Although acts prior to the actual commencement of legal proceedings indicate an intention to rely upon one remedial right, yet they do not constitute an election which will preclude the subsequent prosecution of an action based upon an inconsistent remedial right, unless the acts contain the elements of an estoppel *in pais.*

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7. All the Evidence Shows That Plaintiff Performed Its Obligation Under the Contract.

Defendant asserts (brief p. 14) that evidence was introduced to support its contention that plaintiff's generator was deficient. But defendant does not point to anything in the record to justify this statement.

There was no conflict upon the subject of the bedplate. Defendant admits it was not provided

for in the contract. That is conclusive; the plaintiff was not required to furnish anything that was not contained in the agreement. But the contract specifically places the duty in this respect upon the defendant. It provided:

> All apparatus included herein is to be delivered and erected *on foundations* in the basement of the Spalding Building, Portland, Oregon. (*2)
>
> * * * * * *
>
> 3. In case it is elsewhere herein agreed that the Company shall erect the apparatus herein specified, it is with the distinct understanding that the Company is to furnish the said apparatus and the labor of the erection only, the *Purchaser furnishing all foundations* and masonry work, including grouting, supports, builders' or joiners' work, access to premises, excavation and making good again. It is also understood that the material and workmanship of such foundations, supports, etc., shall be first-class and adequate for the purpose intended. (*17)

The testimony of Mr. Hunt was merely cumulative. Its purpose was to aid the jury to understand the meaning of the contract. The suggestion of defendant that proof must be adduced to show that it had knowledge of the subject matter of Mr. Hunt's testimony is startling. If defendant did not know what a generator was, that was its loss.

Defendant asserts that whether it was guilty of a breach of the contract in failing to pay $1500 on July 15, 1910, was a question for the jury. Here again defendant is in error. The question was one

of law. The legal consequences of defendant's default was to excuse plaintiff from proceeding further with the contract so long as the installment remained unpaid. The authorities cited in the opening brief are conclusive on this point.

Defendant's suggestion that plaintiff did not treat the failure to pay as a breach is based upon an apparent misconception of the legal effect of the default. The opening brief (pp. 33-5) clearly states our position. We contend that while the defendant persisted in its refusal to pay, we were under no duty to hazard further loss, and therefore, in view of defendant's continued default it became immaterial whether or not our subsequent performance was within time. Defendant's argument is addressed to the case of a breach upon which the party aggrieved may consider the contract "at an end", in so far as performance is concerned (brief p. 15). This, of course, is an entirely different matter. The distinction is pointed out in the opening brief at page 35.

The suggestion that the payment of $1500 was in no event due until installation and acceptance of the first generator is opposed to the terms of the contract. It was contemplated that the generator would be in operation on July 1 (*34) but the plaintiff protected itself against delays in installation by providing that the partial payment "will not be made later than July 15, 1910." This date and not the erection of the generator is controlling. Moreover, the defendant's statement that the first

generator "never was accepted" loses sight of the principle of law above discussed that acceptance is unnecessary where due performance is rendered.

Defendant's effort to disclaim its repudiation of the contract is surprising. Whether its abandonment was justified is one matter, but surely there can be no doubt concerning the tenor and legal effect of its letter of August 25. The refusal to accept plaintiff's performance might admit of some question. But the notice, couched in legal terms, that "inasmuch as you have violated your contract with us, the same is void and of no effect" has but one meaning. It entitled the plaintiff to desist from further performance. The plaintiff was not required to weigh other statements of milder tenor to determine whether the positive notice of repudiation meant what it said. This is what defendant asks this Court to do. When legal rights hang in the balance, one party cannot use strong language of well defined legal import merely to note its effect upon the other. The plaintiff is entitled to take the defendant at its word. However, the further language of the letter upon which defendant relies is entirely consistent with its renunciation of the contract. Plaintiff is told to "rectify its broken promises". The law provides the method by which one who "violates his agreement" must make good—in damages.

Defendant criticizes our statement that the ninety-day period began on June 1. "Receipt of the order" was the starting point and defendant

says that Wernicke received it on May 26. But the contract provides for delivery "from our *factory* in approximately 90 days from date of receipt of order with full and complete information."

Plaintiff's factory where the generator and switchboard were to be constructed in accordance with the specifications were at East Pittsburgh. The receipt of the order there started the time running. This is a matter of construction of the contract which rests with the court and, not as defendant says, a fact in dispute for the jury to decide. This Court takes judicial notice of the time required to take the contract to Portland and thence have it delivered by mail at Pittsburgh. Hence, the computation of the ninety-day period in the opening brief.

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8. The Hearsay Testimony.

A word in conclusion concerning the defendant's effort to justify the ruling of the trial court permitting Head to testify what Colonel Spalding had said to him in the absence of any representative of the plaintiff. Colonel Spalding's statements were, of course, purely narative. There was no element of spontaneity; it did not approach the dignity of a verbal act.

Defendant contends for its admissibility first upon the ground that the cross-complaint alleges that its contract with the plaintiff was intended to be a part of its contract with Spalding. But

plainly, this attempt in the pleading to vary the terms of a written agreement would not make evidence on the subject admissible. Otherwise, in order to lay the foundation for the introduction of incompetent testimony, it would only be necessary to allege it in a pleading.

Defendant's next ground is that Wernicke's testimony opened the door for the admission of the hearsay. As defendant states, Wernicke testified concerning his conversation with Head. This, without doubt, permitted the defendant to produce its version of the Wernicke-Head conversation, but not to quote the statements of a third party.

Defendant next would have it appear that Head's quotation of Spalding's remarks was a part of Head's narrative of his conversation with Wernicke. But the record does not bear this out. Head was distinctly asked to tell what passed between himself and Colonel Spalding. Over our objection he related the conversation as an independent matter of evidence (*171-2). He testified that thereafter he "told Wernicke about it." But there was no pretense that the testimony under objection was a narrative of Head's interview with Wernicke, and no endeavor to cure the error which had already been committed.

Finally, it is contended that the hearsay was properly admitted to contradict Winn's statement of the reason why the defendant was directed to remove its apparatus from the Spalding Building.

It is, of course, fundamental that the statement of another person not in the presence of a witness can not be used to impeach the witness. Moreover, Winn was superintendent of Colonel Spalding's buildings, and stated his knowledge of the subject. If the defendant desired to contradict him with Spalding's own views, it should have produced the Colonel himself. In fact, Spalding's own testimony showing why he ordered the defendant to stop work was the only competent means by which defendant could seek legally to prove the assertions upon which it relied.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,
May 3, 1916.

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